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No. 92-1449

# In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT ROOSEVELT PARKER, JR.,
*Petitioner,*

*v.*

THE OREGON STATE BOARD OF BAR EXAMINERS,
*Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON*

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

1. Respondent incorrectly characterizes this Petition as seeking reversal of a decision based on the record of the Board of Bar Examiners (BBX) considered as a "trial court." The unconstitutional state action for which petitioner seeks reversal and remand here is the action of the Supreme Court of Oregon sitting de novo and denying petitioner admission to the bar on a single ground proposed by the BBX. Or, as respondent puts it, "Bar admissions cases are matters of original jurisdiction with the state supreme court. . . ." Resp. Br., 5.

2. This Court is not asked to bog down here in a factual morass to second-guess the Oregon Supreme Court, much less the

BBX. Petitioner seeks only straightforward constitutional relief if this Court grants his petition for certiorari: reversal and remand of the decision of the Oregon Supreme Court for proceedings not inconsistent with this Court's opinion herein.

3. The chief constitutional offense herein of the Oregon Supreme Court as state actor is the highly unusual, perhaps unique, imposition on petitioner of a burden of proving his "good moral character" by "clear and convincing evidence". Neither petitioner nor, apparently, respondent have yet discovered one other state in which this drastic exclusionary standard is imposed.

4. Petitioner also asks this Court to consider whether existing constitutional cases justify even the more familiar imposition of a simple "preponderance" burden of proof on a bar applicant and on an attorney under Bar charges (in Oregon law the two are treated alike, cf. No. 8, below). This point is not adequately answered by citing, as respondent does , Konigsberg v. State Bar #2, 366 U.S. 36 (1961). In fact, respondent's brief echoes petitioner's reminder that the later Law Students Research Council v. Wadmond, 401 U.S. 154 (1971) questioned placing the burden of proof on a bar applicant.

The underlying rationale of Speiser v. Randall, 357 U.S. 513 (1958) cries out for constitutional protection from any burden of proof standard--even a simple "preponderance"-- that is applied with the breadth the Oregon Supreme Court uses here. In this case (In Re Parker, Pet. App. 3 at 39a) the Oregon Supreme Court expressly held that "disposition of the case is made on the impersonation issue". The Court totally disregarded ("we do not reach. . .") other issues and charges. Moreover, in face of "conflicting testimony" (Id., at 39a) with respect to the impersonation issue the Court held that the testimony of one witness "Ms. Thomas is credible and the impersonating conversation that she recounts took place." (Id. at 49a). At this point the Court extended petitioner's burden of proof to extend to individual contested issues of fact: "It follows that applicant cannot prevail on this point [or in his case which the point decides], because it was his burden to convince us that the conversation did not occur as she recounted it." (Id. at 49a). Of course, under the applicable Oregon rule applicant's burden

was to "convince us" by "clear and convincing evidence." The further point made here is that even if this Court were to permit a simple preponderance burden of proof rule in bar admission cases, it should strike down such a rule when it is applied to every individual discrete determination of fact, especially one that is made determinative of denial of admission to the bar. Surely such an application of any burden of proof rule violates Due Process.

5. Respondent dispenses this Court from any concern with Speiser v. Randall, 357 U.S. 513 (1958) because, he incorrectly alleges, "No inhibition of free speech is implicated in Petitioner's case. . . ." Petitioner's express argument that free speech inhibition is implicated in his case appears at p. 19 of his petition.

6. There is a revealing concession at p. 11 of respondent's brief: "When evidence is in dispute or credibility of witnesses is in question, allocation of the burden of proof and the quantum of evidence required may, in a given case, affect the moral character and fitness evaluation." Respondent's counsel of record then contributes an astounding "reassurance" to this Court: "In this case, however, there was ample evidence, much of it undisputed, supporting a conclusion adverse to Petitioner regardless of who had the burden of proof and regardless of the quantum of evidence required." Respondent's counsel then adds: "This is further reason why Petitioner's claims are not appropriate candidates for review by this Court." (Id. at 11). Recalling (see No. 4, par. 2, above) that the Oregon Supreme Court herein declined to value any of this evidence except impersonation in the de novo proceeding now before this Court, this suggestion fairly "shocks the conscience"-- even more than respondent's parading much of this rejected evidence in his so-called "Factual History" (Resp. Br., p. 1). One can hardly visualize a prosecuting attorney in this posture advising this Court: "No need to waste time by reviewing for any violation of Due Process, we have plenty more evidence 'much of it undisputed.' Trust me."

7. The State Bar brief filed for respondent states that "existing case law rejects . . . a contention" that "requiring proof by clear and convincing evidence violates due process of law." (Resp. Br., 8) It

cites no such cases. So far as counsel for petitioner has been able to learn--there are no such cases. (See Par. 3, above.)

8. Not once, but twice (at pp. 4 and 7), Respondent's brief makes the same clearly incorrect and prejudicial statement: That in his Petition for Reconsideration petitioner raised "only one" constitutional issue, the Due Process Clause argument concerning burden of proof. In fact, in his Petition for Reconsideration (Pet. App. 4, pp. 57a and 63a) Petitioner calls the Oregon Supreme Court's attention to In Re Steffen (Pet. App. 7, pp. 89a-96a), and to the fact that the present decision must be changed or face constitutional reversal--clearly on Equal Protection grounds-- because the two cases, Steffen and Parker, he argues, are "indistinguishable". There is no dispute that Oregon Statute ORS 9.480(1) cited in Steffen (at Pet., 93a) and Oregon Statute ORS 9.527(1) (at Pet. App. 1A, p. 7a) are identical. They establish that under Oregon law disciplinary conduct for a lawyer is measured by the same standards as if he were applying for admission to the bar.

9. By camouflaging petitioner's Equal Protection claim Respondent would put at rest the clearly evident issue of race that has dogged the Parker proceeding from its inception. Petitioner Parker's Petition for Reconsideration, at the place cited above (Pet. App. 4, p. 63a) highlighted the race issue: "Reconsideration is necessary to eradicate the false impression that the only difference between Parker and Steffen is their race."

Earlier indications of a racial factor in this proceeding were cited at p. 13 of the Petition. There is some evidence that a relentless pursuit of petitioner had political origins (see Pet. App. 6, 77a-79a). Associate Justice Peterson of the Oregon Supreme Court, the head of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, had sat on reviews of the Parker case. His comments, cited in the Petition at p. 13,, were made after some months of hearings (which began shortly before the Supreme Court decision in In Re Parker (Pet. App. 3). Other comments (not by Justice Peterson) cited in the Oregon State Bar Bulletin article (cited at Pet., 13) pointed to the courts: "Asking the system to change without including the judges is like asking someone who is depressed to just cheer up." The

commenter added that "Bias is usually unwitting." (Id. at 12-13). An unwitting adverse ethnical bias was conceded by even some of petitioner's supporters. (Id. at 10). One lawyer, friendlier than most, is sadly reported as saying to Petitioner: "The trouble with you Bob is that you think you are equal." All this points to the likely distortions in putting a burden of proof of good moral character on bar applicants of diverse ethnic origins-- especially with a requirement of proof by "clear and convincing evidence."

10. JURISDICTION. The postulate for jurisdiction here is, as stated in the Petition, that there was no independent and adequate state ground upon which to rest the decision herein of the Oregon Supreme Court and that the questions raised on this petition for certiorari were properly presented.

No question seems involved with respect to independent and adequate state ground. The Supreme Court cases listed below adequately support jurisdiction where the questions were presented at a motion for rehearing or, as here, on a Petition for Reconsideration which was "considered" by the Oregon Supreme Court. See Pet., App. 4A: "The court has considered the Petition for Reconsideration and orders that it be denied".

The Petition for Reconsideration adequately presented issues of Due Process of Law and Equal Protection of the Laws (see No. 8, above) on September 22, 1992 and the Oregon Supreme Court "considered" these claims until November 24, 1992, when it elected not to afford a forum to these federal issues in this case:

The Jurisdiction Cases:

Boykin v. Alabama, 395 U.S. 238 (1969);

Cardinale v. Louisiana, 394 U.S. 439 (1969);

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983);

Hathorn v. Lovorn, 457 U.S. 255 (1982);

Herndon v. Georgia, 295 U.S. 441 (1935);

Napue v. Illinois, 360 U.S. 264 (1959);

Raley v. Ohio, 360 U.S. 423 (1959);

Vachon v. New Hampshire, 414 U.S. 478 (1974);

Wood v. Georgia, 450 U.S. 261 (1981).

Of particular significance is the case of Wood v. Georgia, 450 U.S. 261 (1981) in which this Court found there was ample support for a remand in the interests of justice, citing 28 U.S.C. #2106 "authorizing this Court to require such further proceedings to be had as may be just under the circumstances."

The entire procedure of seeking a petition for certiorari is, of course, instinct with the element of discretion in the Supreme Court. If the Court, in its discretion, finds merit in the constitutional elements of this Petition, as petitioner hopes that it will, Wood makes clear that the Court will not allow a state court to manipulate a non-decision of constitutional claims by this Court. A state court which has been apprised of constitutional claims by use of its established procedure (here a Petition for Reconsideration) may not foreclose the Supreme Court's hearing of those constitutional claims.

## CONCLUSION

Another of the cases cited above--- District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)---points out (at 482-3, n. 16, where most of the relevant cases are gathered) that "[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court on certiorari to the state court, and not by means of an original action in a lower federal court." Hence, there is no value in respondent's argument (Resp. Br., 8) that absence of traditional hallmarks of "cert

granted" such as conflict of circuits is fatal. And the scarcity (if not nonexistence, see No. 3, above) of other states with "clear and convincing evidence" burdens of proof in bar cases explains the unavailability of state decisions.

The Petition for certiorari should be granted.

Respectfully submitted,

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